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Nos. 80-939, 80-1129, ~~80-2074~~

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION

and

NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Petitioners,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Must the courts defer to the Federal Election Commission's interpretation of 2 U.S.C. § 441a(d), when its interpretation conflicts with the plain language of that provision, and when the basis of that interpretation is neither clearly nor consistently stated?

2. May 2 U.S.C. § 441a(d), which assigns special spending authority to State party committees and their subordinate committees, be construed to allow those committees to transfer that authority to another political committee through the device of "agency" agreements?

3. Is a prohibition on State committee "agency" agreements under 2 U.S.C. § 441a(d) an impermissible infringement on any First Amendment rights of speech and association?

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The October 9, 1980, opinion of the court of appeals is not yet officially reported but appears at Appendix A of the Respondent's Brief In Opposition at A1. The order and opinion of the district court, and the determination of the FEC dismissing respondent's complaint, are also not officially reported and appear in that Appendix at B1 and C1, respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1980. A petition for rehearing, application to recall mandate, and suggestion for rehearing *en banc* were denied on October 11, 1980. Petitions for a writ of certiorari were filed by the Federal Election Commission

and the National Republican Senatorial Committee on December 10, 1980 and January 6, 1981, respectively, and were granted on March 2, 1981. Jurisdiction is conferred by 2 U.S.C. § 437g(a)(9), 28 U.S.C. § 1254(1) (1980).

STATUTES INVOLVED

2 U.S.C. § 437g(a)(8), (9) provides in pertinent part:

> (8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1) . . . may file a petition with the United States District Court for the District of Columbia. . . .
>
> (C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.
>
> (9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

2 U.S.C. § 441a(d)(1), (3) provide:

> (d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.*
>
> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national

committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or (ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

STATEMENT OF THE CASE

Section 441a(d) of the Federal Election Campaign Act of 1971 ("the Act" or "FECA"), as amended, 2 U.S.C. § 441a(d),[1] grants to certain specifically defined "political committees" special spending authority in general election campaigns for the United States Senate. Those commit-

[1] The Federal Election Campaign Act of 1971, P.L. 92-225, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, P.L. 93-443, 88 Stat. 1263; as amended by the Federal Election Campaign Act Amendments of 1976, P.L. 94-283, 90 Stat. 475; as amended by the Federal Election Campaign Act Amendments of 1977, P.L. 95-216, 91 Stat. 1565; and as amended by the Federal Election Campaign Act Amendments of 1979, P.L. 96-187, 93 Stat. 1339.

tees are (1) "the national committee of a political party" and (2) "a State committee of a political party, including any subordinate committee of a State committee." [2] 2 U.S.C. § 441a(d)(3). Each of these named party committees is allowed to spend the greater of $20,000, or "2 cents multiplied by the voting age population of the State," on behalf of their party's candidates for the United States Senate. 2 U.S.C. § 441a(d)(3)(A). The spending power conferred by § 441a(d) on these committees exceeds that allowed other types of political committees or individuals.[3]

Beginning in 1976, pursuant to regulations promulgated by the Federal Election Commission ("FEC"),[4]

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[2] 2 U.S.C. § 431(14) defines "the national committee" as "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission." The Republican National Committee is the "national committee" of the Republican Party. 2 U.S.C. § 431(15) defines "State committee" as the "organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission."

[3] Individuals are subject to the following limits: (1) $1,000 per candidate, per election; (2) $5,000 to any "political committee" in a calendar year; (3) $20,000 to the political committees "established and maintained by a national political party"; and (4) a $25,000 limit overall on all contributions made in a calendar year. *See* §§ 441a(a)(1) and 441a(a)(3). Political committees may contribute $1,000 to a candidate per election; "multi-candidate" committees may contribute $5,000. 2 U.S.C. §§ 441a(a)(2) and 441a(a)(4).

[4] *See* 11 C.F.R. § 110.7. Until this litigation, when the FEC disavowed this interpretation before the Court of Appeals, that agency had consistently construed this regulation to authorize the national committee to make § 441a(d)(3) expenditures through any "agent." Now the FEC contends that this regulation only authorizes the national committee to appoint an "agent" to make § 441a(d)(2) expenditures in the *Presidential* elections, and that it does not bear in any way on § 441a(d)(3) expenditures in *Congressional* races.

the national committee of the Republican party, the Republican National Committee, designated the National Republican Senatorial Committee ("NRSC") as its "agent" for purposes of § 441a(d)(3) expenditures.[5] The NRSC is a "political committee" registered with the Federal Election Commission and established by Republican members of the U.S. Senate to support incumbent and nonincumbent Republican candidates for the Senate. The "agency" arrangement in question consisted, simply, of the NRSC's assumption of the national committee's expenditure limit, and its expenditure of its own funds under those limits.

In 1978, various State committees of the Republican party also designated the NRSC as their "agent" under § 441a(d) and purported to transfer their spending authority under that section to the NRSC. While purportedly an "agent," NRSC in fact was the "principal," spending its own money as it saw fit under limits expressly accorded by § 441a(d)(3) to the State committees.[6] Unlike the case of the national committee "agency" arrangements, no statutory provision or Commission regulation expressly authorized these agreements with State committees.

By virtue of this "agency" device, the NRSC was able to draw upon, for its own account, the total composite

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[5] On the basis of this regulatory authority, the Democratic Senatorial Campaign Committee also entered into an "agency" agreement with the national committee of the Democratic party, the Democratic National Committee.

[6] Thus, the NRSC's description of this arrangement as a standard legal "agency" relationship is incorrect. NRSC Br. at 13. It is equally incorrect for NRSC to suggest that these agreements "facilitate the 'pooling' of resources by coalitions of voters." NRSC Br. at 19. The resources of the NRSC and the State committees are not pooled in the true sense of the word; the NRSC simply takes the State committees' spending *authority* and proceeds to spend its own funds under that authority.

spending ceiling of $3,487,020.80 available to all 34 Republican State committees with Senate races in their States in 1980.[7] The record below demonstrates that, through these agreements in various states, NRSC has been able to use the authority of the State committees to become the most significant funding source for Republican Senate candidates.[8] The State committees, however, have disappeared altogether as a significant factor in § 441a(d)(3) financing.[9]

In a complaint filed with the FEC on May 9, 1980 (designated by the FEC as Matter Under Review ("MUR") No. 1234), the Democratic Senatorial Campaign Committee ("DSCC") challenged the NRSC's "agency" agreements with State party committees.[10] After receiving a response from the NRSC, the FEC General Counsel on July 8, 1980, issued his "First General Counsel's Report" to the Commission, which recommended that the Commission find no "reason to believe" that NRSC's "agency" arrangement with State commit-

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[7] *See* Jt. App. (Ct. App.) at 106.

[8] For example, as a result of these agreements, NRSC could use the California State committee § 441a(d) spending limit of $485,024.00, and the New York State party limit of $379,717.12. *See* Jt. App. (Ct. App.) at 106.

[9] *See* Jt. App. (Ct. App.) at 100-01.

[10] This challenge had been raised and dismissed by the FEC on two prior occasions only the year before. *In Re National Republican Senatorial Committee* (MUR 780) and *In Re National Republican Senatorial Committee* (MUR 820). DSCC did not challenge NRSC's "agency" agreement with the national committee, which in the view of the FEC at that time, had the special sanction of Commission Regulation 11 C.F.R. § 110.7. That regulation like all Commission Regulations had been reviewed by Congress under the FECA's one-house veto provision, 2 U.S.C. § 438(d). The FEC subsequently changed its position and now asserts that this regulation does not authorize the "agency" agreement between the Republican National Committee and the NRSC. *See* n.3, *supra*.

tees violated § 441a(d). On July 10, 1980, the Commission itself considered MUR 1234 and by a 6-0 vote found "no reason to believe" that the FECA had been violated.[11] However, the Commission gave no reasons to explain its action and did not adopt the First General Counsel's Report.

On July 30, 1980, DSCC filed a petition in the United States District Court for the District of Columbia, pursuant to 2 U.S.C. § 437g(a)(8), for review of the FEC's action. That petition sought a declaration that the dismissal of the DSCC's administrative complaint was contrary to law because § 441a(d)(3) does in fact prohibit the NRSC "agency" arrangements with State committees. The parties stipulated to an expedited schedule in which the matter was to be resolved by cross-motions for summary judgment. The District Court heard the matter on August 22. In a decision rendered on August 28, the District Court upheld the FEC's view that § 441a(d)(3) did not prohibit NRSC-State committee "agency" arrangements, and dismissed the action on the grounds that the agency's finding was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[12]

On September 4, 1980, DSCC docketed its appeal of the District Court decision in the United States Court of Appeals for the District of Columbia Circuit. On September 9, 1980, NRSC moved to intervene, and that motion was granted on September 22. Following full briefing and oral argument on an expedited schedule, the Court of Appeals reversed the District Court and held that the FEC's interpretation authorizing the challenged agency agreements was "contrary to law." The Court of Appeals specifically held that the "clear language" of

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[11] *See* Jt. App. (Ct. App.) at 58.

[12] *See* Jt. App. (Ct. App.) at 159-60.

§ 441a(d) precluded the challenged "agency" arrangements whereby NRSC assumed the limits specifically allocated by Congress to State party committees.[13] On October 10, NRSC filed a petition for rehearing with a suggestion for rehearing *en banc* and an application to recall the mandate. On October 11, the Court of Appeals denied both of these motions.[14]

On October 16, NRSC applied to the Chief Justice of the United States for an order staying enforcement of the Court of Appeals' decision, pending disposition of its petition for a writ of certiorari. On October 16, the Chief Justice entered an order temporarily staying the decision below. Following a motion by DSCC on October 17, the full Court on October 21 refused to vacate this temporary stay.[15] DSCC then filed a motion for expedited consideration on October 27. The Chief Justice denied this motion as moot on October 28.[16] Thus, the stay entered by the Chief Justice on October 16 remains in effect.

The FEC and the NRSC filed timely petitions for writs of certiorari, and DSCC filed a brief in opposition. On March 2, 1981, this Court granted the petitions of FEC (No. 80-939) and NRSC (No. 80-1129), and consolidated the cases for briefing and argument.[17]

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[13] *See DSCC* v. *FEC* (No. 80-2074) at A14 (D.C. Cir. October 9, 1980) (hereinafter cited as *DSCC* v. *FEC* with page citations to Appendix to DSCC Brief in Opposition to FEC's and NRSC's Petitions for Certiorari).

[14] *See* DSCC Opp. at E1-E2.

[15] *See* Jt. App. at 8.

[16] *See* Jt. App. at 9.

[17] In opposing the issuance of a writ of certiorari in this case, DSCC contended, *inter alia*, that the passage of the 1980 Congressional elections had rendered this case "moot." In light of this Court's analysis of a similar mootness issue in the recently decided *Democratic Party of the United States* v. *LaFollette*, —— *U.S.* ——, 101 Sup. Ct. 1010, 1015, n.13 (1981). DSCC will not pursue this issue further in this case.

SUMMARY OF ARGUMENT

I. A. The FEC's attempt to avoid judicial review in this case cannot be reconciled with § 437g of the Act, which provides specifically for review of that agency's decision to dismiss a complaint. 2 U.S.C. § 437g(a)(8)(A). Moreover, cases decided under the FECA have established that the FEC's action in dismissing a complaint is subject to judicial review under an "arbitrary, capricious and contrary to law" standard. *Hampton* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 (D.D.C. 1977), *aff'd*, No. 77-1546 (D.C. Cir. July 21, 1978); *Gelman* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130 (D.C. Cir. July 18, 1980) *cert. denied*, 49 U.S.L.W. 3227 (No. 80-209).

B. Since § 441a(d) unambiguously confers special spending authority in Congressional elections on State committees and their subordinate committees, it cannot be read to authorize "agency" agreements whereby NRSC, a national party committee, assumes this authority for its own purposes. The FEC's authorization of these agreements is therefore plainly "contrary to law," and deference by this Court is inappropriate. *Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103, 118 (1978).

C. Apart from its failure to give effect to the plain meaning of § 441a(d), the FEC cannot claim "deference" where, as here, its decision making is devoid of clarity, coherence or consistency. Over a two year period, in the course of which the FEC addressed this issue three times, it repeatedly changed rationales for decisions and reversed itself on significant points of interpretation. In short, the FEC engaged in decision making lacking in the elemental qualities warranting deference from the courts. *Adamo Wrecking Company* v. *United States*, 434 U.S. 275, 287 (1978).

D. In its most recent shift of position, the FEC contends for the first time that the FECA's advisory opin-

ion and rule-making procedures, not a § 437g enforcement action, were the appropriate vehicles for resolution of DSCC's complaint. This most recent contention of the agency would entirely undercut the judicial review provisions of § 437g and would effectively deprive DSCC and similarly situated complainants of judicial review of the agency's refusal to honor the plain terms of the statute. 2 U.S.C. § 437g(a)(8)(A); *National Conservative Political Action Committee* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9057, *modified* and *aff'd*, 626 F.2d 953 (D.C. Cir. 1980).

II. A. Section 441a(d) unambiguously confers special spending authority on State committees by name, and it authorizes those committees to share their limits with, or transfer them to, their "subordinate" committees only. 2 U.S.C. §§ 441a(d), 441a(d)(3). The FEC's own implementing regulations make it clear that the spending authority in question is specific to the State committees and their subordinate committees, 11 C.F.R. § 100.7(b)(1), and that this authority was *not* meant to be "fungible" in nature and thus available to *any* party committee, whether national, State or local. Accordingly, the challenged practice whereby a national committee, the NRSC, substitutes itself for the State and subordinate committees under § 441a(d) conflicts with both the statute and FEC Regulations, and with standard canons of statutory construction. *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955).

B. Moreover, Congress made plain its intent in § 441a(d) to provide a mechanism for State and local, as well as national, party spending in Congressional elections. *See, e.g.*, S. Rep. No. 93-689, 93rd Congress, 2nd Session. Nowhere does the legislative history indicate the contradictory intention that State and local committee authority be transformed into a supplement to a national committee's, the NRSC's, spending limit. The concern with State committee spending power in § 441a(d) is

mirrored throughout the Act, where special provision is made for State and local party involvement in the federal electoral process. *See, e.g.*, 2 U.S.C. §§ 431(8)(B)(x), (xii), 431(9)(B)(viii), (ix). Section 441a(d) may only be understood and construed with reference to this pervasive statutory concern with State and local party involvement. *Gelman* v. *Federal Election Commission, supra; Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973).

III. A. NRSC fails to state a legitimate constitutional claim in alleging that § 441a(d) cannot be construed to bar NRSC-State committee "agency" agreements without impermissibly infringing on the First Amendment rights of the Republican party, any of its constituent committees and individual Republicans. This claimed injury to constitutional rights is not supported in any way by the record in this case, and it cannot therefore be sustained. *Martin Tractor Co.* v. *Federal Election Commission*, 627 F.2d 375 (D.C. Cir. 1980) (*en banc*), *cert. denied sub nom., National Chamber Alliance for Politics* v. *Federal Election Commission*, 439 U.S. 958, 101 Sup. Ct. 360 (1980); *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Moreover, since NRSC and the State committee may achieve the same level of association as "agency" agreements through different means, any burden on First Amendment rights resulting from a ban on "agency" agreements follows from the NRSC's own choice, not from the statute itself.

B. If it is assumed that a ban on agency agreements does burden First Amendment rights, any such burden is marginal and is outweighed by a compelling State interest in promoting the development of State and local party organizations.

B.1. Section 441a(d) expenditures are defined by statute as, and are functionally no different from, "contri-

butions," which may be limited with "little direct restraint . . . on political communications." *Buckley* v. *Valeo, id.*

B.2. Moreover, any limitation on these expenditures through a ban on "agency" agreements would leave unimpaired the substantial spending authority and other associational vehicles available to the Republican party, its constituent committees, and individual Republicans. Thus, any infringement resulting from the "prohibition" on NRSC-State committee "agency" agreements is wholly marginal. *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd*, 616 F.2d 1 (2d Cir.), *en banc*, *aff'd*, 48 U.S.L.W. 3662 (April 14, 1980).

B.3. At the same time, the State interest in promoting State and local party development, which underlines § 441a(d)(3) spending authority, is sufficiently compelling to overcome any marginal infringements on the First Amendment rights. This interest receives expression throughout the Act, *see, e.g.*, 2 U.S.C. §§ 431(8)(B)(x), (xii), 431(9)(B)(viii), (ix), and is grounded in fundamental concerns with a vibrant federalism.

B.4. Nor does a prohibition of NRSC-State committee "agency" agreements render the statute unconstitutionally vague. Section 441a(d) could not be clearer in its requirements, and "[t]he rule of construction to be invoked when constitutional problems lurk in an ambiguous statute does not permit disregard of what Congress commands." *United States* v. *UAW*, 352 U.S. 567, 589 (1957).

ARGUMENT

I. THE FEC'S DETERMINATION IN THIS CASE IS PLAINLY ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW AND CANNOT BE SUSTAINED UNDER "DEFERENCE" PRINCIPLES.

A. Congress Provided Specifically for Judicial Review of Any FEC Determination to Dismiss a Complaint.

In its attempt to escape judicial review of its decision to dismiss DSCC's complaint, the FEC likens that decision to "a determination not to proceed with an administrative investigation, a classic discretionary power." [18] The FEC suggests that its action is committed by law to its discretion, and may not be reviewed by the courts.[19]

The FECA itself wholly refutes that contention. Section 437g provides specifically that "[a]ny party aggrieved by an order of the Commission dismissing a complaint" may seek review in the United States District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A). Upon review, the Court is empowered to "declare that the dismissal of the complaint . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days . . . ." [20] 2 U.S.C. § 437g(a)(8)(C). This judgment of the District Court is appealable to the Court of Appeals and ultimately to this

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[18] FEC Br. at 21.

[19] Thus, the FEC cites two cases, deciding under statutes *other than* the FECA, to support the proposition that its decision in this case is "not reviewable," or "committed to [its] discretion." FEC Br. at 21-22, *citing City of Chicago* v. *United States*, 396 U.S. 162, 165 (1969); *General Motors Corp.* v. *Federal Energy Regulatory Commission*, 613 F.2d 939, 944 (1979).

[20] The Act also provides that, in the event that the agency fails to conform with the District Court order, the complainant may bring an action in his own name to remedy the violation alleged. 2 U.S.C. § 437g(a)(8)(C).

Court. 2 U.S.C. § 437g(a)(9). Thus, the statutory scheme unambiguously subjects agency actions, such as the one now before this Court, to judicial scrutiny.

It is no less settled that, in reviewing the FEC's dismissal of a complaint, the reviewing court will not affirm the agency's action if it was "arbitrary, capricious and contrary to law."[21] Deference is only appropriate where the agency has provided "an adequate statement of reasons which demonstrate a rationale and defensible basis for his [its] decision . . . ." *Hampton* v. *Federal Election Commission, supra.* This deference to the FEC's dismissal of a complaint is not, as the FEC suggests, virtually unqualified, but hinges on judicial analysis of the agency's decision making. The case law developed under the FECA clearly demonstrates that courts have not abstained, under "deference" principles, from a careful review of the basis for the agency's decision. *See, e.g., Hampton* v. *Federal Election Commission, id.,* (examination by the court revealed that FEC's reasons for its actions "adequately demonstrate a rationale and defensible basis for its decision"); *Gelman* v. *Federal Election Commission, supra* (Court upholds decision on grounds that it is clearly "consistent with the language adopted by Congress and with the apparent purpose of the 1976 amendments to the Act.").[22] The FEC itself has acknowl-

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[21] Although it asserts that its decision to dismiss DSCC's complaint was an unreviewable exercise of its investigatory discretion, the FEC ultimately concedes that its decision is subject to review on an "arbitrary, capricious and contrary to law" standard. FEC Br. at 21. NRSC also concedes that applicability of this standard. NRSC Br. at 32.

[22] *See also In re Federal Election Campaign Act Litigation,* Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9082 (D.D.C. 1979) at 50,663 (complaint dismissed by FEC was a "shambles" lacking

edged that, in reviewing agency actions under § 437g, the courts have been required to examine "the reasoning set forth in the General Counsel's report [citations omitted], as well as the face of the complaint, the evidence provided to the Commission, and the arguments put forth in the briefs." FEC Memorandum in Support of its Motion for Summary Judgment, *National Republican Senatorial Committee* v. *Federal Election Commission*, (D.D.C. Civil Action No. 80-2266) p. 9, n.12.

Thus there is no authority for the FEC's contention here that the courts cannot hold the agency to a consistent or coherent analysis in support of its position in a § 437g proceeding.

B. The NRSC-State Committee "Agency" Agreements Upheld by the FEC are Plainly Contrary to Law.

2 U.S.C. § 441a(d) sets forth, in clearest terms, a special grant of spending authority in Congressional elections to two separately named, separately defined entities: "the national committee of a political party," and the "State committee of a political party, including any subordinate committee of a State committee." [23] This provision does not contain any complicated grammatical construction or ambiguous wording. No other political

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in any evidence to support the charges made); *National Republican Senatorial Committee* v. *Federal Election Commission*, (D.D.C. Civil Action No. 80-2266) (review of agency record establishes that FEC properly exercised its discretion).

[23] *See* n.1, *supra*, for the specific statutory definitions of the term "State committee" and "the national committee." FEC Regulations implementing § 441a(d) are found at 11 C.F.R. § 110.7. A "subordinate committee of a State committee" is defined by FEC Regulations as "any organization which is responsible for the day-to-day operation of the political party at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State or any organization under the control or direction of the State committee." 11 C.F.R. § 100.14(b).

committees are provided with these special spending limits in Congressional elections.

Notwithstanding the clarity of this provision, the FEC has interpreted it in a manner wholly at variance with its plain terms and meaning. In place of the State party committee, the FEC would substitute the NRSC, which is neither a "State committee" nor the "subordinate committee of a State committee."[24] The FEC would accomplish this result through its authorization of "agency agreements," which, while clothed in standard legal "agency" terminology, are no more than a mechanism by which NRSC arrogates unto itself the spending ceilings of State committees.

Thus, the FEC's construction of § 441a(d), whereby the spending authority assigned by statute to State committees may be taken by NRSC, is plainly contrary to law and not entitled to deference upon judicial review. The agency has failed to follow the fundamental principle that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929); *accord*, *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).[25] Congress has spoken clearly in § 441a(d), and an appeal to "deference" in matters of statutory construction does not entitle the FEC to rework Congressional will by

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[24] The FEC Regulations define NRSC as one of the "political committees established and maintained by a national political party." 11 C.F.R. § 110.1(b)(2). Thus, NRSC is an organ of the national political party, and is in no way connected or associated with State committees or any other subordinate committees.

[25] This rule of construction was embraced specifically by the FEC in another context, *see* Federal Election Commission's Motion to Dismiss in *Barnstead for Congress Committee* v. *Federal Election Commission*, No. 79-0054 (D.D.C. 1979), but was nevertheless abandoned as a guide in its interpretation of § 441a(d) in this case.

allowing § 441a(d) spending authority to be transferred from the State committees to NRSC. "[T]he courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 . . . , and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" *Securities and Exchange Commission* v. *Sloan, supra, quoting Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968).

C. The Reasoning of the FEC's General Counsel in the Administrative Proceedings Below, and of the FEC in This Litigation, Has Lacked Clarity and Consistency.

On three separate occasions, the FEC has been confronted with challenges to the NRSC-State committee "agency" agreements at issue in this case. In each instance, the FEC has dismissed the challenge without any written (or, for that matter, oral) statement of reasons for its decision.[26] In the absence of any such statement

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[26] The FEC's refusal to supply decisions in § 437g enforcement proceedings is a matter of agency policy and practice. *See Note, The Federal Election Commission, First Amendment and Due Process*, 89 Yale L.J. 1199, 1211 (1980). Moreover, the First General Counsel's Report, which forms the basis for his recommendations to the agency, may not serve as an adequate substitute for formal written agency decision, since the FEC specifically advises that its decision in § 437g cases "are not necessarily based on, or in agreement with, the General Counsel's analysis." *See* FEC *Record*, the agency's official publication, August 1980 edition, p. 10. The FEC's unwillingness to justify its administrative decision making—and its reliance in litigation on post hoc rationalizations for such decision making—impede any effort by the courts to determine whether agency action warrants deference or was instead "arbitrary, capricious and contrary to law." *Dunlop* v. *Bachowski*,

of reasons, resort must be made to the FEC's First General Counsel's Report in attempting to identify a rationale for the agency's decision.

In the first decision upholding § 441a(d)(3) agency agreements between the NRSC and the State committees, MUR 780, the General Counsel relied principally on "the absence of any specific prohibition" of such agreements.[27] Subsequently, in MUR 820, the General Counsel emphasized a regulation, 11 C.F.R. § 110.7(a)(4), which he construed to authorize agency agreements between the *national* committee of a political party and any agent, including the NRSC.[28] The Commission apparently reasoned that this regulation also supported a similar agency agreement between the NRSC and State party committees. In MUR 820, the General Counsel relied, for the first time, on FECA § 441a(a)(4), which authorizes unlimited transfers of funds among committees of the same political party.[29] Although noting that the

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Inc., 421 U.S. 560, 573 (1975); *Burlington Truck Lines* v. *United States*, 371 U.S. 167 (1962) (Court unable to find "indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice.").

[27] *In Re National Republican Senatorial Committee* (MUR 780), First General Counsel's Report at 2.

[28] *In Re National Republican Senatorial Committee* (MUR 820), First General Counsel's Report, p. 3. Section 110.7(a)(4) states that "[t]he national committee of a political party may make expenditures authorized by this section through any designated agent, including State and subordinate party committees." The FEC has reversed this interpretation of § 110.7(a)(4) and now contends that it applies *only* to § 441a(d)(2) expenditures in Presidential elections and does not authorize "agency" agreements for purposes of § 441a(d)(3) expenditures in Congressional races. *See* n.3, *supra*.

[29] Section 441a(a)(4) authorizes unlimited transfers "between and among political committees which are national, State, district, or local committees . . . of the same political party." The General

agency agreements at issue here involve transfers of *spending authority*, not funds, the General Counsel dismissed the critical difference as one of "form over substance."

In addressing the complaint in this action, the agency once again recast its argument. After reviewing its analysis in MUR 780 and 820, the General Counsel conceded that "in retrospect" one of the arguments previously relied upon—that anything not specifically prohibited by the Act is allowed—was the "weaker" of the grounds asserted in support of § 441a(d)(3) agency agreements.[30] Perhaps to compensate for the perceived "weakness," he introduced, for the first time, the alleged significance of the House of Representatives rejection in 1978 of a bill, H.R. 11315. That bill would have, *inter alia*, prohibited intraparty transfers for the purpose of making contributions or expenditures. Although this bill addressed transfers of funds, not of spending authority, the General Counsel nonetheless viewed this postenactment legislative history as somehow dispositive of the issue raised under § 441a(d).[31]

This confusion and inconsistency did not end with DSCC's appeal to the federal courts. In its Memorandum of Points and Authorities accompanying its Cross-Motion for Summary Judgment before the District Court, the FEC based its *de facto* approval of agency agreements on (1) the FECA's authorization of intraparty fund transfers (2 U.S.C. § 441a(a)(4)), and (2) on the postenactment legislative history derived from the House

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Counsel reasoned that if NRSC could transfer funds to the State committee for § 441a(d)(3) purposes, it was somehow "immaterial" if NRSC avoided any transfer altogether and substituted itself for State committees by assuming their spending authority.

[30] *In re National Republican Senatorial Committee* (MUR 1234), First General Counsel's Report at 4.

[31] *See* n.38, *infra*.

rejection of H.R. 11315. Upon oral argument before the District Court, however, the FEC opened with an appeal to the principle, already once disavowed by the General Counsel, that anything not prohibited by the Act was allowed.[32]

In the proceeding before the Court of Appeals, the FEC's position underwent further transmutation when the FEC reversed its prior interpretation of 11 C.F.R. § 110.7(a)(4). FEC had previously interpreted this regulation to authorize agency agreements between the Republican National Committee and the NRSC for purposes of § 441a(d)(3) expenditures in Congressional elections. Before the Court of Appeals, the FEC now took the new position that § 110.7(a)(4) did not apply at all to House or Senate elections; rather it applied only to spending by party committees on *Presidential* campaigns pursuant to § 441a(d)(2).[33]

Finally, in this Court, the Commission has taken the wholly different tack of suggesting that the Commission's law enforcement procedures were not the appropriate administrative vehicle for disposition of this case.[34] The agency now states that the advisory opinion process or formal rule-making procedures of § 437g were the only appropriate vehicles for resolution of DSCC's complaint. Yet at no previous time in the course of this proceeding (either at the agency level below or in this litigation), did the Commission ever suggest, as it now does, that it was *procedurally* barred from construing the plain terms

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[32] The District Court responded immediately by asking counsel for the FEC "isn't it an unusual point of view that you think that something would be included unless it is excluded specifically?" Following explanation by counsel, the court concluded that "that particular argument hasn't too much to recommend it." Tr. at 14.

[33] FEC Br. (Ct. App.) at 9.

[34] FEC Br. at 26-30.

of § 441a(d)(3) in the context of an enforcement action. Not surprisingly, the FEC has introduced no authority for this novel principle of administrative law.

The erratic and confused course of the General Counsel's and the FEC's decision making in this case does not warrant judicial deference. Deference is based on the assumption that the agency will have rendered a persuasive analysis of the statute, its legislative history, and the regulatory problem to which the statute was addressed. *See Securities and Exchange Commission* v. *Sloan*, *supra* at 117-18; *Adamo Wrecking Co.* v. *United States*, *supra* at 287, n.5. Thus, the legal principle of "deference" is not applied automatically or reflexively to uphold any agency determination. Agency "discretion" is not blanket authorization for inconsistent and conflicting reasoning, especially where the agency in question seeks to impose on a statutory provision an interpretation without support in its plain language or its legislative history.

D. The Advisory Opinion and Rule-Making Procedures Were Not Appropriate Vehicles for Achieving a Vindication of the Plain Terms and Purposes of § 441a(d).

FEC contends before this Court, for the first time in this litigation, that the enforcement procedures of 2 U.S.C. § 437g[35] were not the appropriate vehicles for resolution of DSCC's complaint. In the FEC's view, the relief sought by DSCC, namely, enforcement of the plain terms of § 441a(d), could only be achieved by resort to the FECA's advisory opinion and rule-making

[35] As stated above, the FEC at no time, either in writing or orally, advised DSCC or otherwise took the position that the enforcement process was an inappropriate vehicle for resolution of the issue in this case. By introducing this argument at this stage, the Commission is demonstrating once again its refusal to hold to any coherent rationale for its decision.

procedures. For this reason, the FEC concludes that "[n]ot only should the court have deferred to the Commission's expert construction of § 441a(d), but to the extent that the court deemed such a construction inadequately supported by the statute, the court was required to refer DSCC to FECA's advisory opinion and rule-making procedures." [36]

The FEC's argument makes a shambles of the judicial review provisions of § 437g. If accepted by this Court, that argument would require that whenever a complainant appealed a plainly erroneous construction of the Act, the reviewing court would have the limited choice of either deferring to the erroneous construction, or avoiding review altogether by "referring" the complainant to the FECA's advisory opinion or rule-making procedures. Under the FEC's theory, as applied, the FEC's construction of the Act in § 437g enforcement proceedings could *never* be reversed; yet the Act explicitly provides for judicial review—and potential reversal—of agency actions in such proceedings.

The Commission supports its position by suggesting that, where it previously misconstrued the statute, it may only correct itself by creating a "new rule" through formal rule-making procedures.[37] Yet enforcement of a statute as Congress wrote it does not require the promul-

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[36] FEC Br. at 32.

[37] The Commission suggests that a "new rule" is created whenever a reviewing court reverses an agency interpretation which is allegedly "supported by statutory language and legislative history and, by way of analogy, by a Commission regulation and an advisory opinion." FEC Br. at 30. The Commission misses the fundamental point, namely, that in reversing the agency, a court might disagree precisely over whether such "support" for the interpretation in question exists. Under the agency's definition of a "new rule," it could never be reversed on a plainly erroneous construction of the statute.

gation of a "new rule."[38] Moreover, relegating DSCC and similarly situated complainants to either the advisory opinion or rule-making process would deprive them of judicial review of the FEC's determinations in § 437g proceedings. *National Conservative Political Action Committee* v. *Federal Election Commission, supra; Martin Tractor Co.* v. *Federal Election Commission, supra.*

Accordingly, the Commission's attempt to rewrite (and to circumscribe substantially) the judicial review provisions of § 437g is wholly meritless.

II. THE FECA CANNOT BE READ TO AUTHORIZE NRSC-STATE COMMITTEE "AGENCY ARRANGEMENTS" UNDER § 441a(d).

A. Section 441a(d) Plainly Precludes Transfers of State Party Committee Spending Authority to the NRSC.

Central to this appeal is the appropriate interpretation of a statute, 2 U.S.C. § 441a(d). The NRSC, if not the FEC, concedes that, "[t]he starting point for interpreting [the] statute is the language of the statute it-

[38] In any event, NRSC greatly overstates the harm that it will suffer if the FEC reverses itself in this fashion on a prior course of interpretation. Contrary to NRSC's assertion, this case presents no question of a "knowing and willful" violation of the FECA; nor is the FEC bound to impose a civil penalty if circumstances do not warrant it. At most, FEC enforcement of a court order invalidating State committee agency agreements under § 441a(d) would result in settlement with the NRSC through "informal methods of conference, conciliation, and persuasion" culminating in a "conciliation agreement." *See* 2 U.S.C. § 437g(a)(4)(A). Finally, whatever consequences to NRSC follow from this case were avoidable by that committee, since DSCC brought this action early in 1980 before any of the expenditures in question had been made and when NRSC had not, by its own admission, "finalized its plan as to how it [would] support Republican candidates." Jt. App. (Ct. App.) at 32.

self."[39] NRSC Br. at 11, *citing Consumer Product Safety Commission* v. *GTE Sylvania*, 100 Sup. Ct. 2051, 2056 (1980). This concession is dispositive of the central issue in this case, for a straightforward examination of § 441a(d) establishes that it does not allow for the transfers of statutory spending authority achieved through NRSC's "agency arrangements" with the State party committees.

There is nothing confusing or ambiguous in the wording of § 441a(d) to support the gloss offered by the FEC. The provision confers special spending authority in Congressional elections upon two explicitly named political committees: the national committee of a political party, and the State committees of a political party, including any subordinate committee of a State committee. Each of the political committees legally entitled to use of this spending authority is statutorily defined.[40] Under the construction advanced by the FEC, however, the State committees may be replaced altogether by NRSC, which is nowhere named or otherwise referred to in § 441a(d) and which is concededly not a "State committee." By nullifying the role of State committees under § 441a(d) in this fashion, the FEC ignores the principle that, in matters of construction, every effort must be made to " 'give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section." *United States* v. *Menasche*, *supra* at 538-39.

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[39] The FEC exhibits little concern with the plain language, except to assert that it does not expressly *rule out* the use of "agency" agreements. This is a variant of the "anything not prohibited is allowed" rule of construction that the agency or its General Counsel have made use of from time-to-time.

[40] The terms "national committee" and "State committee" of a political party are defined by statute. 2 U.S.C. §§ 431(14), 431(15). The term "subordinate committee of a State committee" is defined by regulation. 11 C.F.R. § 100.14(b).

The construction obvious from the face of § 441a(d) is echoed in the FEC's own regulations, 11 C.F.R. § 110.7 (b)(1), implementing this provision. Those regulations state that the national committee and any State committee "may *each* make expenditures" in connection with Congressional general elections in the specified amount. In this way, the FEC makes it clear that the spending authority is specific to *each* of the named committees; it precludes the construction, advanced by NRSC, that the authority is conferred upon all national and State party committees *as a group*, without regard to which committee within that group actually spends the money.[41]

Moreover, where Congress intended that State committees' § 441a(d)(3) limit be shared, it expressly so stated. Specifically, the statute allows a State committee's limits to be shared with any "subordinate committees of a State committee." Here again, the FEC's own regulations follow the express statutory scheme in specifying that "for limitation purposes State committees include subordinate committees" and that "State committees and subordinate committees *combined*" shall not exceed the specified limits of § 441a(d)(3) applicable to State committees by name. (Emphasis added.) It is apparent from the statute and from the implementing regulations of the FEC that State committees may only share their "2 cents per voter" limit with their subordinate committees. Nevertheless, FEC contends that State committees' § 441a(d)(3) limits may be shared by *all* the various committees of a

[41] The NRSC interprets § 441a(d) as a "broad" grant of authority for national and State committees, one that does not "restrict the methods which may be used by the national and State committees to expend monies within the overall dollar limits." NRSC Br. at 13. Had Congress intended this result, however, it would have fashioned an overall four cent limit applicable to all committees of a political party, either national or State. It did not do so, however, and the FEC cannot ignore Congress' choice of a different scheme.

political party including national party committees such as NRSC. This contention flies in the face of logic and fundamental canons of statutory construction.[42]

The clarity and precision of § 441a(d)(3) in delimiting State party committee spending authority also completely refutes FEC's reliance on the provision authorizing intraparty transfers of funds. This reliance is grounded on the assumption that transfers of funds and of spending authority are indistinguishable, and that if the first is allowed, so must the second. Yet where Congress sought to authorize transfers or sharing of limits by State committees, it did so clearly.[43] There would have been no need for Congress to provide specifically for this sharing if the transfer provision were assumed to accomplish the same result. Under the FEC's reading of the transfer provision and its relationship to § 441a(d), the language authorizing sharing by State committees with their subordinate committees is reduced to mere surplusage.[44]

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[42] NRSC further contends that if NRSC-State committee agency agreements must be prohibited, the same result applies to such agreements between the NRSC and the DSCC and their respective national committees. NRSC Br. at 13, n.16. While the legality of the latter agreements are not before this Court, it is noted here that entirely separate issues are presented by § 441a(d) agency agreements between organs of the same *national* party. *See, e.g.*, § 441a(h), where Congress acknowledged the close relationship between each party's national committee and its Senate campaign committee, such as NRSC, by authorizing them to share a $17,500 contribution limit in U.S. Senate elections.

[43] Similarly, where Congress sought to authorize sharing or transfer of the NRSC's $17,500 contribution limit under 2 U.S.C. § 441a(h), it specifically provided that that limit could be shared by "the national committee . . . or any combination of [the subordinate and national] committees."

[44] Also circuitous and meritless is FEC's reliance on post-enactment legislative history, namely the House's rejection on H.R. 11315, which sought to prohibit intraparty transfers of funds

In sum, § 441a(d)(2) presents no problems of construction. It is entirely lacking in any interpretative ambiguity or complexity. The provision plainly confers spending authority on specifically named and defined committees, including the State committees. Where Congress intended the State committees to share or transfer its limit, it was clear on the point. Any sharing by NRSC, or any other *national* committee, of State committees' § 441a(d) authority is plainly precluded.

B. Construction of § 441a(d) to Preclude NRSC-State Committee "Agency" Agreements is Consistent With the Overall Scheme of the Act.

The constructions urged by petitioners would completely undermine Congress' attempt in § 441a(d) to provide a vehicle for State and local party development in the political party process. Instead of stimulating State committee involvement in federal campaigns, the 2 cent limit assigned to those committees would be a mere supplement to the spending authority of a *national* party committee, the NRSC.

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for the purpose of making contributions and expenditures. First, H.R. 11315 was an omnibus bill amending the FECA; it was not directed solely to intraparty transfers of funds, nor was a separate vote on that issue taken. Second, the House addressed the bill on a proposed rule for consideration, and not on the merits. *See* 124 Cong. Rec. H2261-69 (daily ed. March 21, 1978). Third, the relevant provisions of H.R. 11315 would have prohibited transfer of funds, and not spending authority. Finally, the March 1978 House debate and vote occurred prior to *any* FEC ruling on the legality of NRSC-State committee agency agreements. Thus, there could hardly have been any interest within Congress in reversing an interpretation of § 441a(d) that the FEC had not yet rendered. These facts strongly support this Court's rule that postenactment legislative history "will rarely override a reasonable interpretation of a statute . . . ." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc., supra. See also Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978).

Petitioner NRSC concedes that Congress intended § 441a(d) as a means to "preserve the place of political parties in the elective process." [45] Of course, the political party structure in this country has always functioned on different levels, namely, local, State and national levels,[46] and the legislative history of § 441a(d) makes clear that Congress was concerned as much with State and local party development, as with promotion of the national party structure. *See* remarks of Senator Cannon, Chairman of the Senate Rules Committee and Member of the Conference, 120 Cong. Rec. 518, 525 (1974).[47] Not only did Congress emphasize the State and local party-building function, but there is no indication in the legislative history of § 441a(d) that Congress intended that NRSC, or any other national party committees, could supplement their own defined authority with State committees' 2 cent limit.

The State and local party-building concern is not reflected solely in § 441a(d), but is manifest throughout the Act. Thus, § 441a(a)(4) grants State committees a special exemption from one of the conditions precedent to "multi-candidate" status, an exemption designed to allow such committees to qualify more readily for a

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[45] *See* Pet. NRSC Br. at 12 (*citing* S. Rep. No. 93-689, 93rd Congress, 2nd Session, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 103 (1977)).

[46] *See infra* at 38-41.

[47] *See also* remarks of Representative Frenzel, a member of the Conference Committee, who explained on the floor § 441a(d)'s purpose in increasing "the role of political parties in campaign financing," and who emphasized the parallel federal and State focus of the provision in granting enhanced spending power to "[b]oth the national committee and the State committee of a political party." 120 Cong. Rec. H10,332 (daily ed. October 10, 1974).

higher $5,000 per candidate per election limit.[48] In addition, State party committees, and only State party committees, are exempted altogether from limits in spending for voter registration and "get-out-the-vote" drives on behalf of Presidential and Vice Presidential candidates, and in spending for campaign materials, such as buttons and bumper stickers, for use in "volunteer" activities on behalf of federal candidates.[49] These last two exemptions, in particular, are expressly and strictly contingent on the State committees funding these activities themselves, without receiving funds for this purpose from any national party committees.[50] Section 441a(d) is therefore fully consistent with these State and local party-building provisions.

This view of "overall purpose" of the statute is critical to a fair construction of § 441a(d), *Gelman* v. *Federal Election Commission*, *supra*, for each provision of the Act must be construed to give the statute as a whole " 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose." *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, *supra* at 631-32, *citing Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947). The NRSC-State committee "agency

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[48] *See* 2 U.S.C. § 441a(a)(4). This provision defines the conditions that political committees must satisfy to qualify for the higher "multi-candidate" $5,000 per candidate per election limit. One such condition, that of making contributions to five or more federal candidates applies to all committees "except for any State political party organization."

[49] *See* 2 U.S.C. §§ 431(8)(B)(x), (xii) and 431(9)(B)(viii), (ix).

[50] *See* 11 C.F.R. §§ 100.7(b)(15)(vii), 100.7(b)(16)(vii). In discussing the exemption from limits for "volunteer" activities, the House Report stresses its "purpose . . . to encourage volunteers to work for and with local and State political organizations." H. Rept. No. 96-422, 96th Congress, 1st Session, *reprinted in* U.S. Code Cong. & Ad. News 2860, 2868.

agreements" under § 441a(d) cannot be reconciled with either the Congress' intent in fashioning this special limit for State and local party organizations, or with the Act's overall scheme of special support of State and local party activity and growth.

III. THE COURT OF APPEALS' DECISION NEITHER IMPLICATES NOR IMPERMISSIBLY BURDENS FIRST AMENDMENT RIGHTS TO EXPRESSION OR ASSOCIATION.

A. Petitioner NRSC has Failed to State a Legitimate Claim that a Bar to Delegations of § 441a(d)(3) Spending Authority Burdens the First Amendment Rights of the Republican Party, the State Party Committees or Individual Republicans.

The only question before the Court is whether NRSC may assume § 441a(d)(3) spending authority specifically assigned by Congress to the State party committees.[51] NRSC contends that to bar transfers of State committees' § 441a(d)(3) spending authority impermissibly burdens the First Amendment Rights of the Republican party, the State party committees and individual Republicans. Respondent DSCC respectfully submits that, for two reasons, NRSC has presented no proper constitutional claim.

First, NRSC has not alleged that § 441a(d)(3) is unconstitutional on its face. Rather, it argues that the Court of Appeals' interpretation of that section, as *applied*, will impede the exercise of First Amendment rights. NRSC asserts that State party committees'

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[51] The Court of Appeals noted, *DSCC* v. *FEC* at A13, n.28, and NRSC concedes, NRSC Br. at 20, n.28, that the constitutionality of the overall expenditure limits of § 441a(d)(3) are not at issue in this case.

rights will be burdened because they will be prevented from "economy of scale in expenditures from one source, . . . available expertise in creating and placing advertisements, . . . obtaining media exposure, [and] [*sic*] obtaining credit during the campaign." NRSC Br. at 23, *quoting DSCC* v. *FEC*, at A28-A29 (Wilkey, J. dissenting). NRSC also contends that a ban on delegations of § 441a(d) spending authority will burden the First Amendment rights of individual members of the Republican party by preventing them from "pooling" money through NRSC and thus amplifying their shared viewpoint into "an efficient political message." NRSC Br. at 23. Finally, it claims that a bar to delegations of spending authority will limit political expression by the Republican party as a whole. NRSC Br. at 25.

However, the record is devoid of evidence supporting any of these claimed injuries.[52] Thus, the record upon which NRSC asks this Court to rely is clearly inadequate to support "[t]he careful examination required for first amendment analysis [of statutes] 'as applied.'" *Martin Tractor Co.* v. *Federal Election Commission, supra. See Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 114 (1962).

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[52] Factual support is unlikely to exist, since, as discussed below, NRSC or the State committees may obtain the benefits NRSC claims in support of the challenged agreements through other means wholly consistent with § 441a(d)(3). Although NRSC may believe that delegations of spending authority are the most convenient means through which to obtain these benefits, a ban on the most convenient form of association does not impermissibly infringe First Amendment rights where substantially equivalent forms of associations are still available. *Buckley* v. *Valeo*, 424 U.S. 1, 22; *Republican National Committee* v. *Federal Election Commission, supra.*

In *Buckley* v. *Valeo*, this Court rejected a challenge to the constitutionality of the § 441a(a)(1) contribution limitations because the record failed to support petitioners' claims that these limitations impermissibly burdened petitioners' First Amendment rights. *See, e.g.*, 424 U.S. at 21-22, n.23, 26 & 27. In the present, as in *Buckley*, the alleged injuries are only speculative injuries and thus petitioner has failed to state a legitimate constitutional claim.[53]

Second, the constitutional burdens alleged by NRSC are not the work of § 441a(d) itself. Rather, any burden is the direct consequence of an entirely discretionary decision by the State party committees to delegate all spending authority to NRSC. In deciding to employ the delegation agreements, NRSC and the State committees rejected the many alternative means of effective intra-party cooperation available under the FECA and FEC Regulations.[54] Clearly, this is a case where "[i]nstead of persuading us that . . . a statute has imposed substantial burdens on the party's right to govern its affairs, appellants' own statement of the facts establishes that . . . the [party] . . . is the source of whatever

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[53] The lack of evidence in support of NRSC's constitutional claims reflects the fact that these claims were not before the District Court, and were raised in only a cursory manner immediately prior to oral argument before the Court of Appeals. This lack of record evidence, in conjunction with the Court's traditional reluctance to rule on Constitutional claims unnecessarily, *see United States* v. *UAW*, *supra* at 590-92 and *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), suggests that the Court should decline to rule on NRSC's First Amendment claims. Should NRSC in the future be able to make an appropriate factual demonstration" of the alleged infringement of First Amendment rights, *Buckley* v. *Valeo*, 424 U.S. at 95, n.129, it can proceed at that time to challenge the constitutionality of the prohibition on § 441a(d)(3) agency agreements with State committees.

[54] *See infra* at 35-38.

burdens they suffer." *Marchioro* v. *Chaney*, 442 U.S. 191, 199 (1979). Where as here, the alleged infringement of First Amendment rights results, not from the action of the State, but from appellant NRSC's choice of one of many available courses of action, no constitutional claim exists. *See Republican National Committee* v. *Federal Election Commission, supra, citing Corbitt* v. *New Jersey*, 439 U.S. 212, 218 (1978).

In sum, NRSC has presented no claim that § 441a(d)(3), as construed by the Court of Appeals, has burdened or may in the future burden in a constitutionally cognizable manner the rights of the Republican party, the State party committees, or individual Republicans.

B. A Bar to Delegations of 2 U.S.C. § 441a(d)(3) Spending Authority Imposes No Material Burden on the Exercise of First Amendment Rights and is Outweighed by Significant Governmental Interests.

Assuming, *arguendo*, that § 441a(d)(3), as construed by the Court of Appeals, burdens the exercise of First Amendment rights, it is well established that "[n]either the right to associate nor the right to participate in political activities is absolute . . . ." *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 567 (1973). Even a significant interference with protected rights may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid the unnecessary abridgment of First Amendment freedoms. *Buckley* v. *Valeo*, 424 U.S. at 25.

1. *Section 441a(d)(3) Expenditures are not "Direct Political Expression" at the Core of First Amendment Freedoms.*

NRSC asserts that aggregated § 441a(d)(3) expenditures are a form of political expression by the Republican party, and are entitled to a degree of constitutional protection at least as stringent as that accorded independent political expenditures in *Buckley* v. *Valeo*. NRSC Br. at 25. This assertion is meritless.

First, the FECA defines § 441a(d) expenditures "in connection with the general election campaign of candidates" as "*contribution* to such candidate[s]." 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added).[55] Second, § 441a(d)(3) expenditures do not constitute direct political expression by the Republican party since they in no way communicate the policies, programs and views of the spender. Rather these expenditures merely provide financial support to the *candidate*, whose views on any number of issues may not coincide with those of the national or State Republican parties.[56] Thus, both statu-

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[55] The statute provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). A § 441a(d)(3) expenditure falls squarely within that definition; it is money given by a party committee directly to a supplier of services or goods for the candidate's own account, with the full prior consent and cooperation of the candidate. It is for this reason that § 441a(d) expenditures are otherwise known as "coordinated" expenditures. *See* FEC *Record*, November 1980 edition, p. 6.

[56] Petitioner NRSC also mistakenly likens § 441a(d)(3) expenditures to a candidate's contributions to himself. NRSC Br. at 26. This argument is manifestly fallacious in light of the possibility (indeed probability) that the views of the candidate and the party will differ on particular issues. Nevertheless, if NRSC's "self-support" analogy is to be pursued, the proper comparison to be drawn is that between § 441a(d)(3) expenditures and contributions by members of a candidate's family, which the Court in *Buckley* held to be lawfully limited FECA § 441a(a). 424 U.S. at 54, n.59.

torily and in functional terms, § 441a(d) expenditures are a form of contribution to the candidate, and this Court has stated:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Buckley v. *Valeo*, 424 U.S. 1, 21.

Accordingly, limitations on such expenditures do not constitute the "significantly more severe restrictions" condemned by this Court in *Buckley* v. *Valeo*, 424 U.S. at 23. Because of this, a bar to delegations of § 441a(d)(3) spending authority is "entitled to less-exacting judicial scrutiny." *Common Cause* v. *Schmitt*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9138 (D.D.C. September 30, 1980) at 51,072, and may be justified by a broader range of Congressional purposes than limitations of activities "at the core of our electoral powers and of First Amendment Freedoms" where the spender is the speaker. *Buckley* v. *Valeo*, 424 U.S. 1, 39.

2. *A Bar to Delegations of 2 U.S.C. § 441a(d)(3) Spending Authority Imposes No Material Burden on First Amendment Rights.*

A bar to delegations of § 441a(d)(3) spending authority imposes no material burden on the First Amendment rights of individual members of the Republican

party, the State political committees or the Republican National Committee.

Individual members of the Republican party are wholly unaffected by the Court of Appeals' interpretation of § 441a(d)(3). Notwithstanding the Court of Appeals' decision, an individual wishing to support financially a Republican Senatorial candidate may fully exercise his or her right of association by contributing directly to the candidate, 2 U.S.C. § 441a(a)(1), and to the national and State Republican parties, in the same dollar amounts currently specified in the Act. Such contributor may also, consistent with the Court of Appeals' decision, engage in direct political expression by making unlimited independent expenditures with respect to candidates or issues. Thus, a bar to delegations of § 441a(d)(3) spending authority leaves supporters a "wide range of ways to express their support." *Republican National Committee* v. *Federal Election Commission*, *supra at* 286.

Likewise, the Court of Appeals' decision imposes no material burden on the First Amendment rights of the State party committees. State committee authority to contribute directly to the candidate, 2 U.S.C. §§ 441a(a)(1), (2), and to engage in unlimited "get-out-the-vote" and voter registration activities is wholly unaffected, 2 U.S.C. § 431(9)(B)(ix). Moreover, contrary to NRSC's contention, State committee § 441a(d)(3) spending authority is not substantially burdened. Should the State committee wish to combine its funds with those of NRSC in order to enjoy "economies of scale," it remains free to transfer funds to or receive monies from NRSC, 2 U.S.C. § 441a(a)(4), or to devise joint expenditure programs. Similarly, if a State committee wishes to make more effective § 441a(d)(3) expenditures by employing the expertise of NRSC, it may hire NRSC staff members,

appoint NRSC as its technical advisor, or devise coordinated candidate support programs. These alternatives, *none* of which entail the assumption of § 441a(d)(3) spending authority by NRSC, demonstrate that the Court of Appeals' interpretation of § 441a(d)(3) does not "undermine to any material degree the potential for robust and effective discussion of candidate and campaign issues . . . ." *Buckley* v. *Valeo*, 424 U.S. at 29. *See generally Bread Political Action Committee* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9142 (7th Cir. December 15, 1980) at 51,086.

Finally, a bar to delegations of § 441a(d) spending authority does not materially burden the Republican party as a whole in the exercise of its First Amendment rights. The national committee and the NRSC may make a statutorily authorized direct contribution to any U.S. Senate candidate of up to $17,500, 2 U.S.C. § 441a(h), a special limit not available to any other "political committees." The national committee and any State committee may make § 441a(d)(3) expenditures, and if any such committee is unable to raise sufficient money to exercise fully this extraordinary spending authority, it may receive funds transferred for this purpose from any other party committee, including NRSC. 2 U.S.C. § 441a(a)(4). *All* Republican party committees, including NRSC, may make unlimited expenditures for such activities as party-wide voter registration and "get-out-the-vote" drives, and for candidate and campaign worker training programs. 11 C.F.R. § 106.1(c). Finally, the party committees may not only share funds, but may also freely draw upon one another's staff, technical assistance and other resources in their pursuit of common party goals. All of these practices promote intraparty cooperation toward the goal of electing Republican Senatorial candidates, yet preserve the separate fund-raising and organizational identities and functions of the national and State political parties. The "agency" agree-

ments, by contrast, emasculate the State committees' role in Senatorial elections by reducing it to little more than an accounting convenience serving to double the expenditure authority of the national party. Such a result frustrates Congress' intention to promote vigorous State party organizations as an essential complement to the national parties.[57]

3. *Congress' Vital Interest in Fostering Active State Political Parties Overrides the Marginal Burden on First Amendment Rights Imposed by a Bar to Delegations of § 441a(d)(3) Spending Authority.*

This assumption by NRSC of State committees' § 441a (d) (3) spending authority is not necessary for effective political association and expression by the national party, the State committees, and individual Republicans. On the contrary, though presented in "agency" terminology, this arrangement requires the principals in the purported agency, *i.e.*, the State committees, to surrender all control whatsoever over the manner in which funds are expended in their name. Thus the agreements, in practical effect, facilitate the abdication of the fund-raising and spending functions of the State committees in favor of a national-level political committee, the NRSC. Such a result frustrates the fundamental interest underlying Congress' grant of § 441a(d) spending authority to the State committees, that of active participation by State

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[57] In its Brief, NRSC argues implicitly that the delegation agreements are simply a matter of internal Republican party organization. *See esp.* NRSC Br. at 25, n.33, *citing Ripon Society, Inc.* v. *National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) *en banc, cert. denied*, 424 U.S. 933 (1976). This assertion fails to recognize that the manner in which § 441a(d)(3) spending authority is employed is not solely a matter of internal party organization, but must be guided by Congress' authority to regulate the financing of political campaigns. *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO, supra.*

and local political parties in the federal elective process.

NRSC contends, however, that this Congressional concern with vigorous State party organizations "does not rise to the compelling level necessary to support a restriction on political expression and association . . . ." NRSC Br. at 28-29. In fact, it is difficult to conceive of an interest more compelling or more deserving of Congress' attention in the exercise of its constitutional authority to conduct federal elections. *See* Article I, § 4, of the United States Constitution; *United States* v. *Classic*, 313 U.S. 299 (1941); *Smiley* v. *Holm*, 285 U.S. 355 (1932). Active, healthy State and local parties have long been viewed as critical to the very maintenance of a robust federalism.[58] Any decline in the strength or involvement of such parties would lead to centralization or nationalization of the political party structure, with the result that representation of State and local interests in national affairs would be diminished.[59] In § 441a(d), as well as in other key provisions of the FECA, Congress expressly sought to bolster this critical national-State component to political party activity.[60]

The NRSC-State committee agency agreements completely undermine this Congressional initiative. The agreements represent full and unconditional surrender by State committees, to the national level, of their fund-

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[58] *See Grodzins*, "Party and Government in the United States," in *Political Parties U.S.* (1961), where the author points out that the decentralized party system mirrors and reinforces the federalist constitutional structure, and that centralization of the party structure would eliminate the "sharing of functions" which is the "hallmark of modern American federalism." *See also* Ranney & Kendall, *Democracy and the American Party System* (1956) pp. 488-513.

[59] It is the same concern with overcentralization, at the expense of State and local political strength, that has also animated the current debate over the electoral college system of Presidential selection. *See, e.g.*, Diamond, *The Electoral College and the American Idea of Democracy* (1980).

[60] *See* discussion *supra* at 27-30.

raising and spending role. This result virtually stands § 441a(d) on its head. Where Congress has sought to preserve the basis for State and local party financing of Congressional elections, the agency agreements redirect spending power to the national level. In lieu of assisting with the promotion of State party activity in the current political environment, delegation of § 441a(d) spending authority serves only to further aggregate national power at the expense of State and local party organs.[61]

The NRSC's indifference to this result is all the more striking since the Republican party has emerged as the staunchest advocate of vital State and local party organizations. *See* Crotty, *Political Reform and the American Experiment* (1977) pp. 255-60. A graphic example of this advocacy can be found in the proclamation of the "Rule 29 Committee," an official party committee authorized by the 1972 Republican National Convention to review and study party rules. This committee recommended that the preamble to proposed party bylaws declare that "[a]ll authority, therefore, resides in [the party's] constituent units consisting, first, of its local organizations, then its State committees and only then in its national committees," and that "the work of the party is done by the State and local organizations." Similarly, a resolution approved by this committee stressed that "the most important function of the Republican National Committee is to assist State and local parties in their organizational efforts" and that "the most important function of State parties should be to assist in building local party organizations . . . ." *See*

[61] The impact of recent campaign financing and other political reform on the health of State and local parties was recently analyzed at length by Professor Ralph K. Winter, in the "New Age of Political Reform: Looking Back," Georgia Law Review (Fall 1980), pp. 1-18. Professor Winter concludes that "[l]ocal parties must be strengthened if we are to have parties at all. We are too large and diverse a nation to build parties from the top down."

Report of the "Rule 29 Committee" (issued by the Republican National Committee in 1975), pp. 29-30. Thus the position taken by the NRSC in this case, namely, that the Congressional interest in strong State and local parties is viewed as not "compelling," represents a radical departure from this philosophy.[62]

4. *The Court of Appeals' Interpretation of § 441a (d)(3) Was Proper and Does Not Render the Statute Unconstitutionally Vague.*

The Court of Appeals' interpretation of § 441a(d)(3) is consistent with the plain meaning of the statute and does not render the statute unconstitutionally vague. The ban on State committee delegations of § 441a(d)(3) spending authority is not derived from any vague statutory terms; rather it reflects the Court of Appeals' refusal to acquiesce in the FEC's own novel and unsupportable statutory interpretation. This is not a case in which a statute will bear two equally obvious interpretations, only one of which is clearly in accordance with the Constitution.[63] Where, as here, only one interpreta-

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[62] The NRSC's indifference to this long-standing Republican concern also casts doubt on its assertion that § 441a(d) "agency" agreements constitute "political expression by the Republican Party." NRSC appears to be speaking only for its own narrow political interests, not for its party, in entering into arrangements which enhance national spending power in federal elections at the expense of the States and localities.

[63] NRSC's assertion that § 441a(d)(3) is constitutionally inadequate due to its failure "to provide a precise prohibition of agency agreements," NRSC Br. at 31, n.38, widely misses the mark. The statute, at a minimum is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO, supra.* Indeed, the statute is mathematically precise; it is difficult to conceive of terms less likely to entrap the unwary. Moreover, NRSC's allegation of "vagueness" is not supported by its invocation of its possible liability for *criminal* violation of § 441a. The imposition of even a *civil* penalty is the remotest of possibilities in this case. *See Federal Election Commission* v. *National Right to Work Com-*

tion may be fairly derived from the relevant materials, "[t]he rule of construction to be invoked when constitutional problems lurk in an ambiguous statute does not permit disregard of what Congress commands." *United States* v. *UAW*, *supra* at 589.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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mittee, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9122 (D.D.C. April 24, 1980) at 50,945. In light of the FEC's lengthy, though flawed, deliberations concerning the delegation agreements (upon which NRSC to some degree relied), it strains credulity for NRSC to assert that the Court of Appeals' decision, if affirmed, is likely to lead to imposition by the FEC of such a penalty. *Cf. Eccles* v. *Peoples Bank of Lakewood Village, California*, 333 U.S. 426 (1948). At most, FEC enforcement of a court order invalidating State committee agency agreements under § 441a(d) would result in settlement with the NRSC through "informal methods of conference, conciliation, and persuasion" culminating in a "conciliation agreement." *See* 2 U.S.C. § 437g(a)(4)(A).